In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1062

RONALD GIGLIOTTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that (1) the evidence at trial was insufficient to support his conviction, (2) the evidence before the grand jury was insufficient to support his indictment, (3) the statement of an F.B.I. agent that he was assigned to the Bureau's Organized Crime Division denied petitioner a fair trial, (4) the trial court erred in not ordering a severance *sua sponte*, and (5) petitioner's counsel rendered ineffective assistance by not moving for a severance at trial.

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner and co-defendant Ciro Riccardi were convicted of collecting and attempting to collect an extension of credit through the use of violence and threats of violence, in violation of 18 U.S.C. 894. Petitioner was sentenced to eight years'

imprisonment, subject to the parole eligibility provisions of 18 U.S.C. 4208(a), and fined $10,000. The court of appeals affirmed on December 8, 1975. On January 12, 1976, Mr. Justice Marshall denied an application for extension of time in which to file a petition for a writ of certiorari. The petition was filed on January 26, 1976, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. In any event, there is no reason to grant the petition.

The evidence at trial showed that in May 1971 co-defendant Ciro Riccardi agreed to make a $1,000 loan to Frank DiPalma, in return for which DiPalma was required to pay $50 "vig" (interest) each week until the principal was repaid (Tr. 19-22, 207-209, 218, 221). For approximately three months DiPalma made the weekly interest payments. He then obtained another $1,500 loan from Riccardi with a weekly interest rate of $125. Subsequently, as DiPalma's financial condition deteriorated, he obtained another $1,000 loan from Riccardi with a weekly interest rate of $175 (Tr. 23-28). For several months DiPalma met the $175 weekly interest payments (Tr. 33).

In November or December 1971, DiPalma informed Riccardi that he was having difficulty making the $175 payments. Riccardi agreed to renegotiate the loan upwards from $3,500 to $4,800 and to lower the weekly payments to $100 to be applied against the principal rather than as interest. When DiPalma stated that he would have trouble repaying even $100 a week, Riccardi remarked: "your head will get busted; your legs will get broken" (Tr. 397-400).

By the spring of 1972 DiPalma became unable to meet the weekly interest payments (Tr. 37-38). Riccardi several times went to DiPalma's home and threatened him with bodily injury if he continued not to repay his debt (Tr. 449-452). On one occasion, DiPalma was confronted near a cemetery by a car occupied by Riccardi and petitioner

(Tr. 40, 402-403). Riccardi warned DiPalma that if he was not paid he would put DiPalma in the hospital, and petitioner told DiPalma (Tr. 41):

> Look * * * [i]t doesn't pay for you to get hurt. * * * Why don't you pay him? [sic] or do what you can to pay him?

Approximately two days after this incident DiPalma tried to stall for time by giving Riccardi a bogus $900 check (Tr. 42).

On May 17, 1972, DiPalma went to the police and described his dealings with Riccardi (Tr. A31-A32, 43-47). A few days later DiPalma agreed to cooperate with the Federal Bureau of Investigation in its investigation of the extortion scheme. On June 2, 1972, DiPalma, equipped with a concealed listening device and under the surveillance of F.B.I. agents (Tr. A94-A95, 52-53), met with petitioner, who told DiPalma where he was to meet Riccardi (Tr. 53-54, 64-65). After DiPalma walked to the specified location, petitioner and Riccardi drove up. Riccardi instructed petitioner, with reference to DiPalma (Add. 6; C.A. App. 407):[1]

> Ronnie, you stand right next to him—if he does anything shoot him right in his fucken [sic] head.[2]

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[1]"Add." refers to the addendum to the government's brief on appeal, which contains an accurate version of the transcript of the tape-recorded conversation among petitioner, Riccardi and DiPalma, copies of which were furnished to the jury when the recording was played at trial. The transcript of the recording in petitioner's appendix on appeal (C.A. App. 402-417) contains material inaccuracies (see n. 2, *infra*). Copies of the government's brief on appeal and the appendix filed by petitioner in the court of appeals are being lodged with the Clerk of this Court.

[2]Petitioner's appendix (C.A. App. 407) omits Riccardi's direct reference to petitioner as "Ronnie."

Riccardi and petitioner then demanded the money DiPalma owed Riccardi and warned DiPalma that he would be better off dead if he did not pay it and that he was looking to die (Add. 8, 13, 16; C.A. App. 410, 414, 416). Riccardi also told DiPalma that his reluctance to get in their car would not save him because "[i]f anything we'll come and get you in the street * * * " (Add. 8; C.A. App. 409).

1. Petitioner contends (Pet. 42-47) that the evidence at trial was insufficient to support his conviction, that his meetings with DiPalma "were shown to be nothing more than fortuitous," and that the evidence "proved nothing more than that [petitioner] was a companion of Riccardi" (Pet. 46). Viewed in the light most favorable to the government, *Hamling* v. *United States*, 418 U.S. 87, 124, the evidence of petitioner's presence with Riccardi on several crucial occasions, his threats to DiPalma to persuade him to pay the debt to Riccardi, and his other words and actions showed that petitioner was not merely an innocent bystander and were sufficient to convict petitioner as an aider and abettor. See *Nye & Nissen* v. *United States*, 336 U.S. 613, 619; *United States* v. *Ragland*, 375 F.2d 471, 478 (C.A. 2), certiorari denied, 390 U.S. 925.[3]

2. Petitioner contends (Pet. 22-38) that the grand jury that indicted him had no evidence of his participation in the scheme to extort money from DiPalma. The record indicates, however, that DiPalma twice testified before the grand jury and fully related the details of Riccardi's and petitioner's involvement in the crimes charged. Although DiPalma could not identify petitioner by name in

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[3]An aider and abettor under 18 U.S.C. 2 may properly be charged as a principal. See *United States* v. *Tropiano*, 418 F.2d 1069, 1083 (C.A. 2), certiorari denied, 397 U.S. 1021; *United States* v. *Aldridge*, 484 F.2d 655, 661 (C.A. 7), certiorari denied *sub nom. Good* v. *United States*, 415 U.S. 921.

his grand jury appearances, that identification was established by the F.B.I. through surveillance photographs taken during the June 2, 1972 meeting and was furnished to the grand jury by the government attorney (C.A. App. 394-400).

Although this identification was hearsay, "[t]he grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered." *United States* v. *Calandra*, 414 U.S. 338, 344-345. See also *Costello* v. *United States*, 350 U.S. 359, 362 ("Grand jurors * * * [are] free to make their presentments or indictments on such information as they deem satisfactory"). Here, the prosecutor informed the grand jury of the hearsay nature of the evidence and asked if it wished to question the agent who had made the identification, but the grand jury indicated that further inquiry was unnecessary (C.A. App. 395-396, 398-399).[4]

3. Petitioner's contention (Pet. 38-42) that he was denied a fair trial because of the statement that an F.B.I. agent was assigned to the Bureau's Organized Crime Division is insubstantial. In response to a question on direct examination about his assignment in May 1972, Special Agent Arthur Ruffels stated that he had been assigned to the F.B.I.'s Organized Crime Division.[5] Although the

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[4]There is no requirement that remarks of a prosecutor before the grand jury be recorded, *United States* v. *Peden*, 472 F.2d 583 (C.A. 2), or, for that matter, that any proceedings before the grand jury be transcribed. *United States* v. *John*, 508 F.2d 1134 (C.A. 8), certiorari denied, 421 U.S. 962; *United States* v. *Heck*, 499 F.2d 778 (C.A. 9), certiorari denied, 419 U.S. 1088; *United States* v. *Cramer*, 447 F.2d 210, 214 (C.A. 2), certiorari denied, 404 U.S. 1024.

[5]The record contains no support for petitioner's assertions (Pet. 41, n. 27) that the statement was a "deliberate reference to petitioner" or that it was deliberately intended to prejudice him. The general nature of the prosecutor's question does not indicate an intent to elicit the specific response given by the agent.

trial court denied petitioner's motion for a mistrial, it immediately gave the jury the following cautionary instruction (Tr. A81-A82):

> Ladies and gentlemen, the fact that this witness may be assigned to one unit or another of the FBI is not material to your consideration of this case. I permitted him to answer the question and I see no harm in his answer as such. He is a member of the FBI. And various members of the FBI are assigned to one unit or the other. But that isn't the question for your determination.
>
> Your function is to determine whether or not a crime had been proved in this particular case and whether that crime was committed by these defendants. And not to what division this witness may or may not have been assigned at a particular time.

Not only must it be assumed that the jury observed these admonitions in determining petitioner's guilt, see *Shotwell Manufacturing Co.* v. *United States*, 371 U.S. 341, 367, *Opper* v. *United States*, 348 U.S. 84, 95, but also the jury's acquittal of Riccardi on one count of the indictment indicates that it conscientiously weighed the evidence unaffected by irrelevant considerations.

4. Petitioner claims (Pet. 15-22) that the trial court erred in not ordering a severance *sua sponte* and that his trial counsel rendered ineffective assistance by not moving for a severance. Since neither of these issues was raised in the district court or the court of appeals, they are not now properly before this Court. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16.

In any event, petitioner's contentions are baseless. Petitioner asserts that a severance was required because "[a]ny implication of petitioner came solely through the incriminating evidence introduced against * * * Riccardi"

and that "only Riccardi knew of any involvement by petitioner and Riccardi would have given exculpatory evidence of petitioner but for joinder of the two defendants" (Pet. 16). To the contrary, the record shows that the evidence against petitioner was substantial and that petitioner's involvement was directly testified to by DiPalma and was corroborated by F.B.I. surveillance and tape recordings. Furthermore, there is not the slightest reason to believe that Riccardi would have waived his Fifth Amendment privilege against self-incrimination and would have testified for petitioner at a separate trial, much less that Riccardi's testimony would have exculpated petitioner.

Considerations of judicial economy and the public interest underlie the settled principle that defendants jointly indicted should be tried together except for the most compelling reasons. *United States* v. *Isaacs*, 493 F.2d 1124, 1159 (C.A. 7), certiorari denied, 417 U.S. 976; *United States* v. *Hines*, 455 F.2d 1317, 1334 (C.A. D.C.), certiorari denied, 406 U.S. 975; *Parker* v. *United States*, 404 F.2d 1193 (C.A. 9), certiorari denied, 394 U.S. 1004. In light of this record, the failure of the trial court to order a severance *sua sponte* or of defense counsel to request a separate trial for petitioner was not erroneous. See *United States* v. *Donner*, 497 F.2d 184, 195 (C.A. 7).[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

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[6]Petitioner also asserts (Pet. 47-48) that he was denied the opportunity to file a reply brief in the court of appeals because the government's brief was not filed until December 3, 1975, and was not received until December 5, 1975, three days before oral argument. The order of the court of appeals, a copy of which is being lodged with the Clerk of this Court, required the government to file its brief by December 1, 1975. The certificate of service indicates that the brief was mailed to petitioner's counsel on November 28, 1975.